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CURRENT TOPICS.

The late case of *Robinson v. The Memphis, etc. R. Co.*, before the United States Circuit Court for the Western District of Tennessee, at Jackson, involved a novel and interesting question of commercial law. A cotton merchant in Jackson was in the habit of shipping cotton, and drawing against the shipment drafts with the bills of lading attached, which he procured to be discounted by a bank. By deceit or fraud, he procured from the defendants' freight agent a bill of lading for thirty-two bales of cotton, which he did not deliver for shipment. He attached this bill of lading to a draft on a New York house, ordering the cotton to be delivered to them, and obtained upon this draft money from the bank, and then absconded. The New York firm having paid the draft, but receiving no cotton, sued the railroad company upon its bill of lading. A plea stating these facts as a defense was on demurrer sustained as sufficient, by Hammond, J., who held that the authority of a railroad company's agent, in respect of a bill of lading, commences only with the delivery of goods to him, and extends only to the issuance of a bill for goods actually received, and that it is not within the apparent scope of his authority to sign and issue documents for the purpose of having them attached to drafts, or otherwise pledged as collateral security. The court thus applied to the case of a railroad's bill of lading, the well-established law governing shipments by vessel, as held in *Grant v. Norway*, 10 C. B. 665, and *The Schooner Freeman*, 18 How. 182. The court declined to treat the carrier in such cases as an insurer outside the contract of carriage, or as engaging in the business of issuing bills of lading to be used as negotiable securities by bankers or merchants for their own convenience. "Commercial men have from time immemorial, for their own advantage and not at all for that of the carrier, let it be remembered, treated these documents as convenient symbols, or muniments of title; and as instruments of transfer of title, they

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have for that purpose acquired among them a quasi negotiability, or capacity to pass from hand to hand by indorsement. But the carrier is not at all benefited by this, and it is not for his gain that it is done." The case is one of first impression as regards railroads, but the decision seems to be based on sound principles of both law and commerce.

Among the almost innumerable suggestions for a new scheme of bankruptcy that have made their appearance from time to time recently, the latest that we have seen, and certainly in some respects the most original, is by Mr. Wm. L. Royall, of the New York bar, being a draft of a proposed National Bankrupt Act, with a report on the subject of bankruptcy, prepared by request of the Chamber of Commerce of Richmond, Va. Among the most important of its provisions are: the addition to the enumerated acts of bankruptcy under the act of 1867, of the borrowing money or obtaining property under false or fraudulent representations; the omission of any provision for voluntary bankruptcy; the appointment of standing assignees by the court; the requiring them to give bond to the Government, and the investing them with some of the powers of a master in chancery; the omission of any provision for a register in bankruptcy; the abolition of all *State exemption*, and the reduction of exempt property to the value of \$250; and the discharge of the bankrupt by the court, upon being satisfied that the law has been complied with in all particulars, from all his debts, not excepting those arising out of breaches of trust or fiduciary relations, as in the act of 1867. Some of these provisions are, of course, of questionable validity, as is also one providing that, when one or more members of a partnership shall be adjudicated bankrupt, "the assignee shall take the place in the firm of each person adjudged to be bankrupt; and in his capacity of assignee of each he shall have full and complete partnership powers, but for the purpose only of winding up the affairs of the firm, and drawing out therefrom the interests and rights of that one or those whom he represents as assignee!"

The most striking provision of the prop-

osed act, however, is one that the Attorney-General of the United States shall designate certain State courts of original jurisdiction to be courts of bankruptcy of the United States, and empowering courts so designated to execute and enforce the act, and that such designation shall be communicated to the Governor of the State; and when the legislative department of the State shall authorize the courts so designated to become courts of bankruptcy of the United States, and the judges of such courts shall have entered upon their records a declaration of willingness to enforce this act, and to become judicial officers of the United States, they shall be clothed with jurisdiction as fully as the District Courts of the United States.

A committee of the American Bar Association, appointed in August, 1880, at its sitting at Saratoga, was directed to inquire and report at its next annual meeting whether Congress can clothe the State Courts with power to execute a National Bankrupt Law. The report in August, 1881, was adverse, principally upon the authority of *Ex parte Knowles*, 4 Am. L. Reg. 598; *United States v. Lathrop*, 17 Johns. 4. Mr. Royall, however, thinks that the scheme above suggested would be legal, and argues plausibly in favor of that view. *Mitchell v. Manf. Co.*, 2 Story, C. C. 648.

Unquestionably, if the legality of such a system could be thoroughly established, there are many things to be said in its favor, not the least of which would be the increased convenience and economy of the scheme.

DORMANT PARTNERS.

Dormant partners, secret partners, silent partners, special partners, shareholders in joint-stock and other unincorporated companies, are the non-combatants of commerce; like other non-combatants, they are ready enough to share in the spoils of victory, and more than willing to shirk alike the toils of the conflict, and the consequences of defeat. It is this latter weakness which so frequently brings them within the jurisdiction of courts of justice.

The dormant, silent, or secret partner is one whose name is not used in the style or

business of the firm, who usually takes no active part in its conduct, but, by reason of having contributed to the capital stock of the partnership, participates in its profits, and, "in respect of the profits," to use Lord Eldon's phrase,¹ becomes liable to share in its losses. His connection with the firm is generally, if not necessarily, unknown to the outside world. Some authorities hold that one may be a dormant partner, and, of course, entitled to the privileges of that character, although known to be a partner by reputation or the declarations of his copartner;² and it seems that he may even be held a dormant partner, although actively engaged in the business ordinarily transacted by the partnership. In *Mitchell v. Dall*,³ the court admits that "it appears a solecism in terms to say, that he who is actively engaged in the business, should be dormant; yet, in the strict legal acceptance of the term, we are led to believe every partner is considered dormant unless his name is mentioned in the firm or embraced under general terms, as the name of one of the firm and company." The better opinion, however, seems to be that secrecy is an essential element of the character of a dormant partner. If, for example, a dormant partner retires from a firm, he is not obliged to give notice, public or private, of his retirement, in order to escape liability for after-contracted debts of the partnership; but if he has been known to any person dealing with the firm, as a partner in it, he is obliged to give notice of his retirement to that person; for if he does not, he will be liable to him for after-contracted debts of the partnership;⁴ as to that person, he is a partner neither unknown nor dormant.

It is a well settled rule of law that a person is not to be deemed a dormant partner, merely because his name does not appear in the firm and partnership style. Where the word "company" is used, the partners constituting the company are partners in the same manner, and liable to the same extent, as if their names were expressed.⁵ Whether a person is a dor-

¹ *Ex parte Watson*, 19 Ves. Jr. 461.

² *Winship v. United States Bank*, 5 Pet. 573 (per Baldwin, J.); *Bank of St. Mary's v. St. John*, 25 Ala. 566.

³ 2 Harris & G. 159.

⁴ *Carter v. Whalley*, 1 B. & Ad. 11; *Farrar v. Deffinne*, 1 Car. & K. 580; *Edwards v. McFall*, 5 La. Ann. 167.

⁵ *Goddard v. Pratt*, 16 Pick. 428; *Deford v. Rey-*

mant partner or not so as to excuse notice of dissolution, retirement, etc., is a question of fact for a jury.⁶

If not universally, therefore, it is generally the case that the dormant partner is a secret partner whose connection with the firm is purposely concealed, either with a view of avoiding responsibility for its debts, or for other reasons. Whenever discovered, he can be held liable to the creditors of the firm for all the debts contracted during his connection with it, not because any credit has been given to him, but because he has shared in the profits. The liability of irregular partners is always founded upon one or the other of these considerations. The nominal partner is liable for the debts of the partnership, because without contributing anything to its capital, or withdrawing one penny from its profits, the use of his name gives to the firm a credit which, without it, the ostensible partners could not have commanded; and the secret partner is responsible, because, although he has added nothing to the credit of the firm, he has diminished the fund liable to the demands of its creditors by the share of the profits which he withdraws and to which his capital invested entitles him.⁷ No agreement, however stringent, which he may form with his co-partners can save him from this liability; for it depends not at all upon the stipulation of the articles, but upon the general principles of commercial law.⁸

The responsibility of the secret partner for the debts of the firm begins with his entrance into it; he can be held liable for no contracts of his copartners previous to that event, although they may have been made with express reference to his future interest in the business. In *Young v. Hunter*,⁹ one firm purchased goods on credit, and afterwards agreed to let another firm have a share in the adventure when the goods should have been put

on board ship for exportation. It was attempted to hold the latter firm liable as dormant partners in the original purchase with the first, but the court held that they were not liable, and would not have been if the parties had agreed beforehand that one house should purchase the goods and let another into an interest in them, that other being unknown to the vendor.

As already intimated, the secret partner can not be held responsible for debts of the firm contracted after his actual retirement from it, provided, however, he has throughout his connection with the partnership preserved strictly his *incognito*. If he has, no notice of dissolution or retirement is necessary to terminate his responsibility;¹⁰ if he has not, if any person dealing with the firm knows that he is interested in it as a secret or dormant partner, as to that person he is a general partner, and to him he would be liable for debts contracted by the partnership after his retirement, unless special notice were given to such supposed creditor, of the retirement from the firm of the dormant partner.¹¹ The liability of the secret partner does not depend upon the fact that any credit is given, or supposed to be given, to him, but he is held responsible for engagements entered into while the connection subsists, for the double reason that he takes part of the profits, and that he is a contracting party acting through his agent, the ostensible partner, whose acts bind all whom he represents, if done in their business and for their benefit.¹² When, therefore, the secret partner retires in fact from the firm, the reason of his responsibility ceases. He is not liable as a contracting party, for he does not contract; he no longer withdraws any portion of the profits from the partnership or its creditors,

nolds, 36 Pa. St. 325; *Bernard v. Torrence*, 5 Gill & J. 383.

⁶ *Goddard v. Pratt*, *supra*.

⁷ *Winship v. United States Bank*, 5 Pet. 529, 562; *United States Bank v. Binney*, 5 Mason, 176; *Ex parte Watson*, 19 Ves. Jr. 459; *Hoar v. Dawes*, 2 Doug. 371; *Coope v. Eyre*, 2 H. Blks. 37, 48; *Ex parte Gellar*, 1 Rose, 298; *McDonald v. Millandon*, 5 Lou. 406; *Lea v. Gulce*, 13 Smed. & M. 656; *Smith v. Smith*, 27 N. H. 244.

⁸ *Winship v. U. S. Bank*, 5 Pet. 529; *U. S. Bank v. Binney*, 5 Mason, 176.

⁹ 4 Taunt. 583.

¹⁰ *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Kelley v. Hurlburt*, 5 Cow. 534; *Evans v. Drummond*, 4 Esp. 89; *Armstrong v. Hussey*, 12 Serg. & R. 315; *Benton v. Chamberlain*, 28 Vt. 711; *Kennedy v. Bohannon*, 11 B. Mon. 120; *Ayrault v. Chamberlin*, 26 Barb. 89; *Warren v. Ball*, 37 Ill. 76; *Ellis v. Bronson*, 40 Ill. 455; *Grosvenor v. Lloyd*, 1 Metc. 19; *In re McManus*, 7 Irish Ch. 82; *Deford v. Reynolds*, 36 Pa. 325.

¹¹ *Carter v. Whalley*, 1 Barn. & Ad. 11; *Farrar v. Deffinne*, 1 Car. & K. 580; *Edwards v. McFall*, 5 La. Ann. 167.

¹² *Richardson v. Farmer*, 36 Mo. 35; *Thompson v. Davenport*, 9 Barn. & C. 78; *Raymond v. C. & E. Mills*, 2 Metc. 319; *United States Bank v. Binney*, 5 Mason, 176; *Winship v. United States Bank*, 5 Pet. 529.

and he is not liable as giving credit to the firm, because, being unknown, he gives no credit. Upon the instant, therefore, of his actual retirement, his liability ceases. A general partner, it is hardly necessary to say, is liable for debts contracted by the firm after his retirement, unless due and legal public and private notice be given of the change which has taken place in the partnership.¹³

A dormant partner, unlike a general partner, need not be made a party plaintiff in suits brought by the firm. Some authorities hold that he *ought not* to be joined in the action.¹⁴ Lord Mansfield does not consider him an allowable party plaintiff. In *Lloyd v. Archbowl*,¹⁵ he says: "There is a material distinction between the case where partners are defendants and where partners are plaintiffs; if you can find out a dormant partner defendant, you can make him pay, because he has had the benefit of your work; but a person with whom you have had no privity of communication shall not sue you." There are, however, many cases in which it has been held that a dormant partner is an allowable, though not essential, party to the suit, and that neither his joinder nor omission furnishes any ground of abatement, nonsuit or error.¹⁶ The fact, however, that a dormant partner is joined in the action as plaintiff, will not be permitted to prejudice the case of the defendant. He may plead and prove an individual set-off against the ostensible partner, or avail himself of any other like defenses, in the same manner and to the same extent, as if the suit had been brought by the acting partner alone.¹⁷ And where a surviving dormant partner brought suit on a partnership contract, it was held that the suit was well brought, but that the right of set-off

was preserved to the defendant,¹⁸ who could prove a demand in his favor against the deceased partner.

A dormant partner may be joined as defendant with the ostensible partner, and the weight of authority is that his non-joinder is no ground for the abatement of the suit. Lord Eldon held¹⁹ that the creditor "though he may, if he chooses, is not bound to go against the dormant partner;" and in *Ex parte Norfolk*,²⁰ he re-affirms the same principle, that the creditor, at his option, may consider his original vendee his sole debtor, or, finding that another has taken a share of the profits, hold him liable also.²¹ It is, however, intimated that if the dormant partner has become known to the creditor, he should be included in the action;²² but the better opinion is that the election of the creditor is untrammelled.

In *Dubois v. Ludert*,²³ it was held that a defendant had a right to plead in abatement the non-joinder of his secret partner, in order to compel the plaintiff to bring a new action against the two, in which they could set-off a debt contracted by the plaintiff to the secret partner, in which both partners were equally interested. This case, however, has been severely criticised,²⁴ and can hardly be considered authoritative. It seems very unreasonable that a plaintiff's suit should be abated because he had not made a person a party whom he did not know to be a partner, and for not declaring upon a secret partnership which, if denied, he could not have proved.

The liability of a secret partner is, under certain circumstances, greater than that of an ostensible or active partner. For example, if the managing partner borrow money and give his own security for it, it does not, as to general partners, become a partnership debt by being applied to partnership purposes. As to them, it is an additional contribution of their copartner to the capital of the partnership,

¹³ *Lansing v. Gaines*, 2 Johns. 204; *Ketcham v. Clark*, 6 Johns. 144.

¹⁴ *Clark v. Miller*, 4 Wend. 628; *Clarkson v. Carter*, 3 Cow. 84; *Shropshire v. Shepherd*, 3 Ala. 733.

¹⁵ 2 Taunt. 325. See, also, *Mawman v. Gillett*, *Ibid.*, note.

¹⁶ *Hilleker v. Loop*, 5 Vt. 116; *Boardman v. Keeler*, 2 Vt. 65; *Lapham v. Green*, 9 Vt. 407; *Monroe v. Ezell*, 11 Ala. 603; *Desha v. Holland*, 12 Ala. 519; *Cothay v. Fennell*, 10 Barn. & C. 671; *Robson v. Drummond*, 2 Barn. & Ald. 303; *Skinner v. Stocks*, 4 Barn. & Ald. 437; *Lucas v. Delacour*, 1 Maule & S. 250; *Hopkins v. Kent*, 17 Md. 72. See, also, *Walte v. Dodge*, 34 Vt. 181; *Wood v. O'Kelly*, 8 Cush. 406; *Rogers v. Klebline*, 36 Pa. 293.

¹⁷ *Leveek v. S. atoe*, 2 Esp. 468; *Stacy v. Deey*, *Ibid.*, note.

¹⁸ *Beach v. Hayward*, 10 Ohio, 445.

¹⁹ *Ex parte Hamper*, 17 Ves. 403.

²⁰ 19 Ves. 457.

²¹ *De Mantort v. Saunders*, 1 Barn. & Ad. 401; *Baldney v. Kitchen*, 1 Stark. 338; *Mullett v. Hook*, 22 Eng. C. L. 259; *Hopkins v. Kent*, 17 Md. 72; *Mitchell v. Dall*, 2 Harris & G. 171; *Stansfield v. Levy*, 3 Stark. 8.

²² *Hopkins v. Kent*, 17 Md. 72.

²³ 5 Taunt. 609.

²⁴ *Ex parte Norfolk*, *supra*; *De Mantort v. Saunders*, *supra*.

and he is entitled to a credit for the amount on the books of the firm. The dormant partner, however, in such case is liable, not because the debt was contracted upon the credit of his name, but because he participates in the profits of the firm, and to that extent diminishes the fund to which creditors have a right to look for payment. He can not, however, be made responsible upon the bill, but upon the money counts only.²⁵ This latter conclusion, it may be remarked, is a little incongruous with the general theory of partnership; if the dormant partner is liable at all, he is liable as partner, and it is of the essence of the relation of partnership that each partner is the agent of the others and of the firm, authorized to bind it and them within the scope of the partnership business. Hence it would seem that the acceptance of one partner, for the firm, of a bill, although accepted in his own name only, should be considered the act of all, including the dormant partner, binding all by whose authority, express or implied, it was executed. In *Drake v. Beckham*,²⁶ it was held that a secret partner is liable on a written contract made by the ostensible partners only, and the suit was properly brought against the avowed and secret partners jointly upon the written contract, because, the court said, it was made on behalf of the secret partners as well as of those who signed it.

In another respect the secret partner is at a disadvantage. In general, a release of one partner is a release of all; but, "a party has always a right against a concealed partner, of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault; as if he had not used due diligence in finding him."²⁷ None of the acts done by an ostensible partner, which are usually held to discharge the others, such as accepting new bills, etc., will operate to discharge a partner, not known to the creditor, if done during the time of concealment of such partner.

In *Swann v. Steele*,²⁸ it was held that a secret partner was bound by the indorsement or acceptance of his active partner, although the effect may be to misapply partnership funds or otherwise defraud him. Lord Ellenborough said: "There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are, and yet they are all bound by the acts of any of the partners in the name or firm of the partnership." The dormant partner can only escape liability of this character by showing that the ostensible partner acted without authority, and that the creditor knew it.

On the other hand, after a secret partner has retired, payments, made by the firm upon the debts for which he was bound, operate to release him, although the payments were made out of the funds of the continuing partners, and subsequently contracted debts of their own in the hands of the same creditors are left unpaid.²⁹

Where goods are sold to a partner for the use of the firm, all his associates in the business are liable, although the existence of the partnership was unknown to the creditor at the time of the sale;³⁰ and if the vendor of the goods, so sold, in ignorance of the fact that there are any secret partners, takes the note, not under seal, of the ostensible partner, he may sue the secret partner when he discovers him, upon the account for the goods, although there has been a judgment upon the note, an execution issued, and a return of *nulla bona*.³¹ The common-law rule is, that an open account is not extinguished by a bill or a promissory note, unless it is accepted as a satisfaction of the account; but this rule does not at all apply to the case of a dormant partner. A creditor may have accepted in good faith the note of his apparent debtor in satisfaction of his account; but if he has done so in ignorance of the existence

²⁵ *Graeff v. Hitchman*, 5 Watts, 454; *Bevan v. Lewis*, 1 Sim. 376; *Emily v. Lye*, 15 East, 6; *Fenn v. Harrison*, 3 Tenn. 757; *Sefton v. Walker*, 1 Camp. 384; *Grace v. Smith*, 2 Black. 998; *Hadfield v. Jamison*, 2 Munf. 66; *Re Warren*, Daviess, 324; *Mason v. Ramsey*, 1 Camp. 384.

²⁶ 11 Mees. & W. 315; s. c., 9 Mees. & W. 79. See also *Etheridge v. Binney*, 9 Pick. 272; *Winship v. United States Bank*, 5 Pet. 530.

²⁷ *Robinson v. Wilkinson*, 3 Price, 544.

²⁸ 7 East, 210. See, also, *Ridley v. Taylor*, 13 East, 17; *Ex parte Bonobus*, 8 Ves. 540; *Livingston v. Roosevelt*, 4 Johns. 251; *Dubois v. Roosevelt*, 4 Johns. 262; *Livingston v. Hastie*, 2 Caines, 246; *Lansing v. Gaines*, 2 Johns. 300.

²⁹ *Newmarch v. Tealby*, 14 East, 239.

³⁰ *Bisel v. Hobbs*, 6 Blkf. 479; *Griffith v. Buffum*, 22 Vt. 181; *Braches v. Anderson*, 14 Mo. 441.

³¹ *Watson v. Owens*, 1 Rich. L. (S. C.) 111; *Nichols v. Cheairs*, 4 Sneed (Tenn.) 229; *Brozee v. Poyntz*, 3 B. Mon. 178; *Scott v. Colmesuil*, 7 J. J. Marsh. 420.

of a secret partner, he has not forfeited his remedy against him by such acceptance. A creditor can not be held to have elected to look to one partner alone, when he was in ignorance of the existence of the partnership. To be bound by his acceptance of the note as a satisfaction, he must have had knowledge of all the facts, and of the liability of the dormant partner, and acted with reference to those facts and that liability.³²

In Massachusetts the common-law rule is reversed. It is there held that when a debtor gives his own negotiable bill or note for a pre-existing debt, it is *prima facie* evidence of payment. The presumption may be rebutted by proof of fraud, concealment or the like, but the *onus probandi* is shifted from the defendant to the plaintiff.³³ The numerous exceptions, however, which have been made by adjudged cases, have almost, or altogether, restored the common-law rule.³⁴

Where a note is given by a partner, signing his own name, for goods put into partnership, the dormant partner, it was held,³⁵ is not, in Massachusetts, liable, provided the signature was not intended to be that of the firm, and it was so understood by the payee at the time of the contract.

In this connection it may be remarked that where the individual name of one of the partners is habitually used as the style of the firm, the proof of his signature is of itself not sufficient to entitle the holder of a note to recover against the firm or a dormant partner. It is held in some cases that it is not even *prima facie* evidence that the transaction appertained to the partnership business. The burden of proof is on the plaintiff, if it appears that the partner was separately engaged in a similar pursuit;³⁶ for in that case his signature is an

equivocal act; but if it does not so appear, and if it be in proof that the name in question is the firm name, the presumption will be, in the absence of proof to the contrary, that it was used for the firm.³⁷

When a dormant partner becomes bankrupt, his assignee succeeding to such rights as the bankrupt possessed while solvent, can withdraw from the hands of the active partner no part of the assets of the firm, until after all its creditors have received full payment. Bankruptcy operates as a dissolution of the partnership, and, the bankrupt being in a financial sense *civiliter mortuus*, the assignee, as a *quasi* administrator, can only receive from the acting partner the share of the net results of the liquidation of the partnership, which an actual administrator could have recovered. The law, however, permits creditors, at their option, to recognize the dormant partnership, or to treat their contracts with the firm as individual transactions with the ostensible partner.³⁸ If, on the other hand, the active partner becomes bankrupt, the partnership is dissolved, and the dormant partner's liability for the partnership debts remains unchanged. If, however, he had retired before any of the existing debts were contracted, he may prove any demands he may hold against the bankrupt, as a general creditor.³⁹

A dormant partner can be held liable for a debt contracted by his copartners for land used in the partnership business, although the title was taken in the name of his partners, and he was wholly unknown in that transaction, as well as in the general business of the firm. The land became partnership property, and being, in contemplation of law, converted into personalty, the dormant partner was entitled to share in it, as part of the assets of the firm, and with the greater justice liable for its cost.⁴⁰ The statute of frauds in no degree relieves him from that responsibility.

³² *Nichols v. Cheairs*, 4 Sneed (Tenn.), 229. See, also, *Shehey v. Mandeville*, 6 Cranch, 263; *Watson v. Owens*, 1 Rich. L. (S. C.) 111; *Cushman v. United States*, 2 Sumn. 438.

³³ *Palmer v. Elliott*, 1 Cliff. C. C. 63; *Maneely v. McGee*, 6 Mass. 143; *Thacher v. Dinsmore*, 35 Mass. 299; *Hsley v. Jewett*, 2 Metc. 168; *Fowler v. Bush*, 21 Pick. 230.

³⁴ *Walkins v. Hill*, 8 Pick. 522; *Butts v. Dean*, 2 Metc. 76; *Reed v. Upton*, 10 Pick. 522; *Jones v. Kennedy*, 11 Pick. 126; *Comstock v. Smith*, 23 Me. 202; *Gilmore v. Buzzey*, 12 Me. 418; *Varnier v. Nobleboro*, 2 Me. 221; *Descadillas v. Harris*, 8 Me. 298; *French v. Price*, 24 Pick. 13; *Melledge v. Boston Iron Company*, 5 Cush. 158; *Fowler v. Ludwig*, 34 Me. 461.

³⁵ *Palmer v. Elliott*, 1 Cliff. C. C. 64.

³⁶ *Palmer v. Elliott*, *supra*; *Manufact. etc. Bank v. Winship*, 5 Pick. 11; *U. S. Bank v. Binney*, 5 Mass. 176; *Miner v. Downer*, 19 Vt. 14.

³⁷ *Bank of Rochester v. Monteath*, 1 Den. 402; *Palmer v. Stephens*, 1 Den. 479; *Bank of S. C. v. Case*, 8 Barn. & C. 427; *Miller v. Manice*, 6 Hill, 114. See, also, *Mifflin v. Smith*, 17 Serg. & R. 165; *Jones v. Fegely*, 4 Philad. 1.

³⁸ *Talcott v. Dudley*, 5 Ill. 438.

³⁹ *In re McManus*, 7 Irish Ch. 82.

⁴⁰ *Brooke v. Washington*, 8 Gratt. 252.

A party may be held responsible as a dormant partner in this country, although by the law of the place where the alleged firm transacts its business, the relation, either secret or avowed, does not exist. Thus in *Cuba* the law requires all partnerships to be registered, and unless the law is complied with, refuses to recognize the relation at all. In *Oakley v. Aspinwall*,⁴¹ a Cuban partnership which was doing business as a firm in violation of this law, was held to be a valid partnership to the extent of binding for its contracts, as dormant partner, one who had participated in its profits.

The secret partner, from the very conditions of his existence as such, evades, as far as he can, the publicity which would convert him into an ostensible partner, and subject him to the liabilities which the law imposes upon that character. Hence, in most of the litigation upon this subject, the leading issue is partner or no partner. To enter upon the discussion of what acts constitute one a partner with another, would exceed the proper limits of this paper. It will suffice to state the leading principles,—that participation in the profits of a business is the test of partnership;⁴² that it must be proved like any other fact, and can not be established by surmise or innuendo;⁴³ that an admission of the existence of a partnership is conclusive upon the party so admitting it;⁴⁴ that the existence of the relation can not be established as to one of the alleged partners by proof of the declarations of his alleged copartners; that an admission in such case can not affect others than the party making it;⁴⁵ that general reputation, with corroborating circumstances, will suffice to prove a partnership;⁴⁶ and that one holding himself out as a partner, will be a ble as such.⁴⁷

1 Contracts out of which partnerships arise are frequently irregular, and sometimes there

is a legal partnership between two parties, neither of whom intends such a connection, or suspects its existence. The liability of a secret partner often depends upon the character and degree of notice which the creditor may have of the peculiar terms and limitations of the partnership. Where, for example, a vendor is notified, before selling to a partner, that there is a partnership, but that by its terms each partner is liable only for contracts of his own making, the vendor is fully warned, and can look for payment only to his own vendee, because the authority which one partner has to bind his copartners, is an implied authority, and may be disclaimed by notice brought home to the creditor. If, on the other hand, the information be that the interest of the other party does not amount to a partnership, that is only a denial of the partnership, and if untrue, whether wilfully or from ignorance of the law of partnership, the vendor can hold all the partners liable.⁴⁸

The usual incentive of secret connections in business is the natural desire of mankind to combine the maximum of profit with the minimum of risk. This is not very easy to do under any circumstances, and the law, as has been seen, is by no means favorable to attempts of that character. It especially reprobates the element of secrecy, which is so invariably a concomitant of fraud, and, in the interests of public policy and the rights of creditors, surrounds the secret partner with so many perils as in effect to neutralize all the advantages of his mystery. Legislation, however, in many of the States, has found, in limited partnerships, a middle ground between the open hazards of general partnership and the precarious security of the secret partner. From connections formed under these statutes, the element of secrecy is sedulously eliminated. Public notice must be given, and the limits of liability openly announced, so that credit may be given only in proportion to the means provided for the payment of debts. Partnerships formed under carefully framed statutes of this character, are in every respect preferable to the indefinite liabilities of general partnership, and the doubt-

⁴¹ 2 Sandf. S. C. 8.

⁴² *Osborne v. Brennan*, 2 Nott & McC. 427; *Miller v. Price*, 20 Wis. 120; *Whitney v. Luddington*, 17 Wis. 140; *Coope v. Eyre*, 1 H. Bkts. 37; *Bowyer v. Anderson*, 2 Leigh, 550; *Brigham v. Dana*, 29 Vt. 1; *Biglow v. Elliott*, 1 Cliff. C. C. 28.

⁴³ *Hudson v. Simon*, 6 Cal. 453.

⁴⁴ *Fenn v. Timpson*, 4 E. D. Smith, 76; *Palmer v. Pinkham*, 33 Me. 32.

⁴⁵ *Currier v. Silloway*, 1 Allen, 19; *Gordon v. Bankhead*, 37 Ill. 147; *Drennan v. House*, 41 Penn. 30.

⁴⁶ *Whitney v. Sterling*, 14 Johns. 214.

⁴⁷ *Ripley v. Evans*, 22 Mo. 157.

⁴⁸ *Baxter v. Clark*, 4 Ired. 127; *Ensign v. Wands*, 1 Johns. Cases, 171; *Boardman v. Gore*, 15 Mass. 339; *Bailey v. Clark*, 6 Pick. 372; *Reynolds v. Cleaveland*, 4 Cow. 382.

ful and often fraudulent semi-security of the secret partner.

WILLIAM L. MURFREE, Sen.
St. Louis, Mo.

MAINTENANCE AND CHAMPERTY.

By the common law maintenance and champerty were crimes.¹ Champerty was a species of maintenance, and punished in the same manner. There are various definitions of champerty, differing, however, but little from each other. Hawkins defines it to be "the unlawful maintenance of a suit in consideration of a part of the debt, or other thing in dispute."² Coke says it is "to maintain to have part of the land, or part of the debt or other thing in dispute."³ According to Chitty it is "a bargain to divide the land (*campum partiri*) or other subject in dispute, on condition of his carrying it on at his own expense."⁴ Sir William Grant says: "Champerty is the unlawful maintenance of a suit in consideration of a bargain for a part of the thing or some profit out of it."⁵ "By champerty," says Bouvier, "is meant a bargain with a plaintiff or defendant (*campum partiri*) to divide the land, or other thing sued for, between them if they prevail at law, the champertor agreeing to carry on the suit at his own expense."⁶ The definition given by Blackstone is the same as Mr. Chitty's, adding: "A man may, however, maintain the suit of his near kinsman, servant or neighbor with impunity;⁷ otherwise, the punishment was by fine and imprisonment, and by the statute 32 Henry VIII., c. 9, a forfeiture of ten pounds." By the statute 32 Henry VIII., ch. 9, no one could sell or purchase any right or title to the land, unless the vendor had received the profits therefor for one

year, or was in actual possession of the land, or of the reversion or remainder. This crime was also severely animadverted upon at the Roman Law, and punished by a forfeiture of one-third of their goods and perpetual infamy.⁸ The tendency of modern times has been towards mitigating the severity of punishment for maintenance and champerty.⁹ In some of the American States the subject is regulated by statute. Where there are no such statutes, the sanction of the courts will not be given to champertous contracts.¹⁰ It has been held in a few decisions that, as the reason for the rule did not exist in America, the law was not in force without an express statute. This was held in *Bayon v. McLane*,¹¹ where the question was ably argued by counsel, and an elaborate opinion delivered by Harrington, J. The same opinion was held in *Wright v. Meek*,¹² an early Iowa case. This case was overruled by *Boardman v. Thompson*,¹³ which states the rule as above stated.

The English doctrine of champerty is not in full force in Missouri. For an explanation of the doctrine as there held, see the case of *Durke v. Hoyer*.¹⁴ While as between the parties a champertous contract is void, and neither can enforce it, yet a defendant can not avail himself as a defense, of the fact that a champertous contract had been entered into by the plaintiff's attorney.¹⁵ Where an attorney was employed to bring an action, and to receive for his fee the first fifty dollars he collected, *held*, not a champertous contract.¹⁶ It is not maintenance for one or more persons to contribute money in order to carry on a criminal prosecution.¹⁷ Where there was an agreement between an attorney

⁸ 4 Blk. Com. 135.

⁹ 2 Bish. Cr. Law, sec. 104-116.

¹⁰ 1 Ohio, 132; 4 Pet. 184; 4 Pet. 110; 2 John. 386; 19 John. 313; 11 Wheat. 258; 3 Ves. 511; 15 Ves. 156; 18 Ves. 126; 22 Ind. 471; 21 Ind. 479; 13 Ind. 117; 9 Port. 488; 9 Metc. 489; 1 Pick. 415; 13 Ohio, 167; 10 Paige, 365; 2 Denio, 607, before code of procedure. As to modifications, see 5 Johns. Ch. 44; 5 Paige, 311; 23 Barb. 420; 9 Ala. 715; 8 B. Mon. 488; 4 Mich. 537; 5 Monr. 413.

¹¹ 3 Har. R. 139.

¹² 3 G. Green, 472.

¹³ 25 Iowa, 487.

¹⁴ 2 Mo. App. 1.

¹⁵ Allison v. C. & N. W. R. Co., 42 Iowa, 274.

¹⁶ Scott v. Harmon, 109 Mass. 237; Moses v. Bayley,

55 Ga. 283; Allard v. Lamirande, 29 Wis. 502.

¹⁷ Commonwealth v. Dupray, Bright, 44, s. c. 4, Clark 1.

¹ 1 Rus. on Crimes; 1 Greenlf. on Ev., sec. 154; Parsons on Contracts, 262; 4 Kent Com. 489; Wallis v. Duke of Portland, 3 Vesey, 501; Pichelli v. Watson, 8 M. & W. 691; Sweet v. Parr, 11 Mass. 549; Thurston v. Percival, 1 Pick. 406; Barnes v. Story, 1 Jones Eq. 100; Elliott v. McClelland, 17 Ala. 206; Brown v. Beauchamp, 5 T. B. Mon. 413.

² Pleas of the Crown, ch. 84, sec. 1.

³ Co. on Litt. 368, b.

⁴ 2 Chitty Crim. Law, 234, note a.

⁵ 15 Ves. 139.

⁶ Bouvier's Law Dictionary, vol. 1, 235; 1 Pick. 416; 5 Monr. 416; 4 Litt. 117; 5 Johns. Ch. 44; 7 Port. 488.

⁷ 4 Blk. Com. 134.

and client, by which the attorney was to prosecute the action, pay the expenses and receive one-half of the fruits of the litigation, it was held that the contract was void for champerty, but the attorney entitled to full compensation for his services in prosecuting the action to judgment.¹⁸ Where, in an action upon a note or mortgage, the attorney offered no proof at the trial as to his retainer, if any, or for whom he appeared, and on being asked so to state, refused to do so, it was held not to be sufficient to support a conclusion of law that he was guilty of maintenance.¹⁹ Champerty differs from maintenance in the fact that the person who supports the suit of another at his own expense is guilty of champerty, while he who receives a portion of the profits of the litigation is guilty of maintenance. Upon whom did the expense of the litigation fall, seems to be the test question in such cases.²⁰ A mere agreement to receive a part of the money recovered will not render a contract void (see the above case of *Scott v. Harmon*), but an agreement to bear the expenses of a suit voids the contract.

CHARLES BURK ELLIOTT.

Muscatine, Iowa.

¹⁸ *Stearns v. Felker*, 28 Wis. 594.

¹⁹ *Andrews v. Thayer*, 30 Wis. 228.

²⁰ *Orr v. Tanner*, 12 R. I. 94; *Coleman v. Billings*, 89 Ill. 183.

PARTNERSHIP REAL ESTATE — SURVIVING PARTNER—AUTHORITY.

SHANKS V. KLEIN.

Supreme Court of the United States, October Term, 1881.

1. Real estate purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the copartners.

2. For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated, and though he can not convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate, and the right to compel a conveyance of the title from the heir or devisee in a court of equity.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Mr. Justice MILLER delivered the opinion of the court:

This is a bill in chancery filed by John A. Klein and many others in the Circuit Court of the United States for the Southern District of Mississippi against David C. Shanks, the appellant, as executor of the last will and testament of Joseph H. Johnston. The substance of the bill is, that in the lifetime of Johnston, there existed between him and Shepherd Brown a partnership, the style of which was Brown & Johnston. That their principal place of business was at Vicksburg, in the State of Mississippi, where they had a banking-house. That they had branches and connections with other men in business at other places, among which was New Orleans. That they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent civil war. That this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business. That early in the war, namely, in 1863, Johnston died in the State of Virginia, where he then resided, and left a will by which all his property, including his interest in the partnership, became vested in Shanks, who was made the executor of the will. It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war—the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown, who had become surviving partner, returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston, and the other firms with which that was connected. He found that suits had been commenced against him as surviving partner by creditors of the firm, and, in some instances, attachments levied, and became satisfied that, unless he adopted some mode of disposing of the property of these partnerships, and applying the proceeds of such sale to the payment of the debts in their just order, the whole would be wasted, or a few active creditors would absorb it all. Under these circumstances, acting by advice of counsel, he conveyed all the property of the firm of Brown & Johnston to John A. Klein, in trust for the creditors of that partnership, with remainder, if any, for the use of the partners and their heirs and devisees. Klein accepted the trust, and sold the lands and paid debts with them, or with the proceeds of the sale, as directed by the deed of trust. There is an allegation that Shanks, while acting as executor of the will of Johnston, about the time the deed of trust was made by Brown to Klein, had an interview with Brown, and being fully informed of the condition of the affairs of the partnership, expressed his approval of what Brown intended to do. This is denied in the answer, and some testimony is taken on the subject. Other questions of bad faith on the part of Brown are raised. But in the view which we take of the case, the record establishes the facts,

that Brown acted in good faith, that the best that could be done was done for the creditors of the partnership of Brown & Johnston, and for those interested in the property of the firm.

It appears that after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will, instituted in the circuit court in which this bill is filed, actions of ejectment against these purchasers, who filed this bill to enjoin him from further prosecuting the suits, and to compel a conveyance from him of the legal title to the real estate which came to him by the will of Johnston, his testator. Being satisfied, as already stated, of the fairness and honesty of the proceedings of Brown and Klein, and of the purchasers from them, and waiving as of no consequence, in regard to the principal question in the case, the allegation of Shank's concurrence in or ratification of Brown's action, there remains the question of law, raised by the counsel on the part of Shanks, of the power or authority of Brown, as surviving partner, to bind him by the conveyance to Klein, and by the sales made under that deed.

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes within the rule of equity on that subject. Nor is it denied by the counsel who have so ably argued the case for the appellant, that the creditors of the partnership had an equity superior to that of the devisee of Johnston, to have their debts paid out of this property. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a court will enforce against Shanks as the holder of the legal title.

Counsel for appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided moiety which was originally in Johnston, maintain that Brown, as surviving partner, for the purpose of paying the debts of the partnership, had power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, and that the trust deed which he made to Klein was effectual for that purpose. That by Klein's sales to the other appellees they became invested with this equitable title and with the right to compel a conveyance of the legal title from Shanks. One of the learned counsel for appellant concedes that at the present day the doctrine of the English Court of Chancery "extends to the treating of the realty as personality for all purposes, and gives the personal representatives of the deceased partner the land as personality, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence, that partnership real estate was in fact in all cases, and to all intents and purposes, personality." He

denies that the principle has been carried so far in the courts of America, and asserts the extent of the doctrine to be that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the firm, and for any balance found due to either partner on a final settlement of the partnership transactions. Insisting with much earnestness that the right of the surviving partner, and of the creditors through him, is no more than a lien, his right to enforce it by a sale, as if it were personal property, is denied, and the necessity of a resort to a court of equity to enforce the lien is insisted on.

We think the error which lies at the foundation of this argument is in the assumption that the equitable right of the surviving partner and the creditors is nothing but a lien.

It is not necessary to decide here that it is not a lien in the strict sense of that word; for if it be a lien in any sense, it is also something more.

It is an equitable right accompanied by an equitable title. It is an interest in the property which equity courts will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This contract extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English Court of Chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject.

We think, also, that the preponderance of authority in the American courts is on the same side of the question. In the case of *Dyer v. Clark*, 5 Metc. 562, that eminent jurist, Chief Justice Shaw, of the Supreme Judicial Court of Massachusetts, while using the word lien in reference to the rights now in controversy, asks: "What are the true equitable rights of the partners as resulting from their presumed intentions in such real estate? Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the parties who advanced the capital, before it shall be applied to the separate use of either? The creditors have an interest indirectly in the same appropriation, not because they have any lien, legal or equitable, upon the property itself, but on the equitable principle that the real estate so held shall be deemed to constitute a part of the fund from which their debts are to be paid before it can be legally or honestly diverted to the private use of the parties. Suppose

this trust is not implied, what would be the condition of the parties? etc." "But treating it as a trust, the rights of all the parties will be preserved." It is clear that in the view thus announced the right of the creditors is something more than an ordinary lien. In the case of *Delmonico v. Delmonico*, 2 Sandf. 366, where the precise question arose which we have in the present case, the vice-chancellor held that "Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John, he had an absolute right to dispose of it, for the payment of the debts of the firm, in the same manner as if it had been personal estate." In so deciding he followed the English authorities, and cited *Feredy v. Wightwick*, 1 R. & Mylne, 45; 1 Mylne & Keen, 649; *Ibid.*, 663; *Brown v. Brown*, 3 *Ibid.* 443; *Cookson v. Cookson*, 8 Sim. 529; *Townshend v. Devaynes*, 11 Simons, 498, note. In the case of *Andrews' Heirs v. Brown's Admr.*, 21 Ala. 437, the Supreme Court said that, "inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose; for it would never do to charge him with the duty of paying the debts, and at the same time take from him the means of doing it. Therefore, although he can not by his deed pass the legal title which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts, and the survivor is charged with this duty, his deed will convey the equity to the purchaser, and through it he may call on the heir for the legal title and compel him to convey it." In the case of *Dupuy v. Leavenworth*, 17 Cal. 262, Chief Justice Field, in the name of the court, said: "In the view of equity it is immaterial in whose name the legal title of the property stands—whether in the individual name of the copartner, or in the names of all; it is first subject to the payment of the partnership debts, and is then to be distributed among the copartners according to their respective rights. The possessor of the legal title in such case holds the property in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title."

If the case could be held to be one which should be governed by the decisions of the courts of Mississippi, because the principle is to be regarded as a rule of property, which we neither admit or deny, the result would still be the same.

In one of the earliest cases on that subject in the high court of errors and appeals of that State, *Markham v. Merritt*, 7 How. 457, Chief Justice Sharkey, in delivering the opinion of the court, concurs in the general doctrine that "when land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel." A careful examination of the Mississippi cases cited by counsel has disclosed nothing in contravention of this doctrine, nor anything to support a denial of the authority of the surviving partner to dispose of such property for the payment of the debts of the partnership.

We are of opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, that they had a right to the aid of a court of chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston, and the decree of the circuit court to that effect is affirmed.

CONTRIBUTORY NEGLIGENCE — RIDING IN DANGEROUS POSITION—INVITATION OF CARRIER.

DOWNEY v. HENDRIE.

Supreme Court of Michigan, October 5, 1881.

It is not an answer to the charge of contributory negligence for a passenger, injured in consequence of riding in a dangerous place, to say that he did so at the invitation of the carrier.

Error to Superior Court, Detroit.

Griffin, Dickinson, Thurber & Hosmer, for plaintiff in error; *Brennan & Donnelly*, for defendant in error.

GRAVES, J., delivered the opinion of the court:

The plaintiff having taken passage on a street car of the defendant, fell from the car and the wheels crushed his elbow. He was between forty and fifty years old, a butcher and dealer in fat cattle, had lived many years in Detroit, was familiar with street cars and with that which injured him. He brought this action to recover for the injury, and, when the evidence was closed, the learned judge being of opinion that it was too obvious to be questioned that the plaintiff's own negligence was the material, if not the exclusive, cause of his being hurt, directed a verdict for defendant. It is now urged that, in view of the state of the evidence, the plaintiff was entitled to have the sense of the jury on it.

The facts of negligence alleged as the cause of injury are claimed to present two separate grounds of recovery; and viewing the declaration under the theory, and as favorably as possible for

the plaintiff, they may be stated substantially as—First, assigning the plaintiff to a seat from which there was danger he would be thrown and injured in case of a sudden jerk of the car, and then causing such jerk by starting up the horse by a blow of the driver's whip; and, second, negligently running over the plaintiff after he had been thrown from the car to the track.

Whatever color is found in the case for the claim made by the plaintiff's counsel for a submission to the jury on the ground first mentioned, is confined to the plaintiff's own testimony. He entered the car at the rear end, passed right through to the front platform where the driver stood, and sat down, with his back out, on the driving-bar, a thin iron rail not exceeding an inch in thickness. The car was moving at a moderate pace, and when it had gone a short distance only, the plaintiff fell off backward and the wheels passed over his arm.

There was no conductor except the driver, and fare was paid at a box placed at the front door. Both doors were standing open, and the plaintiff, as he testified, went forward to pay his fare, at which the driver called him out and invited him to be seated on the bar, and he seated himself accordingly. That there was abundance of unoccupied seating room inside the car, and that he was not hindered by any one from sitting there. That the car had moved about one block when the driver struck the horse and "tipped" plaintiff over. That the blow caused the car to "jump him right off." There is no evidence that the driving of the car was not according to the usual and proper mode.

This part of the case is not much pressed; but the point is understood as being, that granting the driving bar to have been, as the plaintiff knew, a dangerous seat, and also admitting that the fact of his occupying it was a proximate contributory cause of his injury; yet, as his sitting there was on the driver's invitation, it ought not to be reckoned as contributory negligence. There is no doubt that it has been laid down as a rule that an assignment of the passenger by the carrier to a position of danger may in case of injury estop the carrier from setting up the occupation of that position as contributory negligence. But the rule is plainly not one of universal application.

Regard must be had to the passenger's capacity to look out for himself; to the opportunity there may be to get a safer position; to the distinctness, certainty and extent or degree of the peril, and so on.

Take the case of a child, and the case of a man every way qualified to take care of himself; the case where the position given seems tolerably safe and no better one is perceived, and the case where it is one manifestly full of danger and a safe one is known which is equally accessible. It would be very unreasonable to apply the rule equally to all. May the ordinary passenger, with his eyes open and with abundant accommodations before him which are safe, accept an invitation

from the carrier to ride on the cow-catcher, and then, if injury arise from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might, would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being, and in substance to stultify himself in order to cast a liability on another.

"Judges can not denude themselves of the knowledge of the incidents of railway traveling which is common to us all." *Siner v. Great Western R. Co.*, L. R. 4 Ex. 123; *Dublin*, etc. R. Co. v. *Slattery*, 3 App. Cas. 1155 (24 Eng. 713); *Lake Shore*, etc. R. Co. v. *Miller*, 25 Mich. 274. And in the example put, the negligence would be so obvious, and its commission so palpably and certainly inexcusable, that a court would not be justified in treating the question of the passenger's responsibility as an open one. A direct charge would be called for.

Other cases may be supposed where, from the nature of the circumstances, a blind acceptance of the carrier's suggestion, however hazardous, would not so clearly reveal the passenger's disregard of that primary duty which rests on every one to exert his own will and judgment to guard against needless perils, as to justify the judge in taking the matter from the jury. No doubt, the riding on a cow-catcher would, to ordinary apprehension if not in fact, be an exposure to consequences more serious than any at all probable to arise from riding on the driver's bar of a street-car in the way in which the plaintiff rode on this occasion; but the unfitness of the situation and the fact that it involves great risk of some injury more or less severe, and is therefore one of extreme danger, is just as conspicuous in one case as in the other.

Indeed, the proposition is a plain one, that different exposures to material bodily injury may be equally great, while the severity of the injuries threatened by the exposures may be entirely different.

Was there any proper case to be submitted on the second ground? The position taken here is that supposing the plaintiff's fall to have arisen from his own carelessness, yet that the defendant was then bound to use ordinary care to avoid hurting him, and that there was evidence before the jury tending to show that he did not. The argument for this view concedes that the evidence given for the plaintiff affords no basis for it, and that the record contains nothing to countenance it, except the testimony of Mr. Whiting, a witness for the defendant. The various witnesses had different opportunities for seeing what took place, some noticing one incident and some another, and each has explained in his own style how matters looked to him, in his position and under his state of mind and attention. But as to the point under consideration, the testimony of no one derogated from the current tendency.

We shall not pause to examine the right of a

trial judge to step aside from the plaintiff's evidence and take up and put to the jury as an account on which a finding for the plaintiff would be regular, the statements of a witness on the other side who assumes to give only a part of the transaction and shows that he was not in a situation to see the rest, and did not see it, and whose testimony, as far as it goes, is reconcilable with the other evidence for the defense. The inquiry is unnecessary, because the case may be well disposed of on the theory of plaintiff's counsel.

What were the circumstances so far as indicated by Mr. Whiting? He sat on the front seat next to the platform and with his back towards it, and on the same side from which the plaintiff fell. He was engaged in conversation with Mr. Dyer. His position enabled him by a "side glance" to look out of the window. The plaintiff fell backward from the rail, and a noise occurred, and the witness made a "side glance," and looking through the window, saw the plaintiff clinging with both hands to the "dash-board." He was dragging on the ground nearly under the car, and was so dragged about 10 feet. The witness did not look towards the platform, and did not see the attempt by the driver, as explained by other witnesses, to extricate or save the plaintiff. What he saw was by looking through the window, and he did not see the driver. He says the car was going quite slow, and when he discovered the plaintiff clinging to the "dash-board," the brake was on and the car under check, and he thought the car was stopping as quick as possible. When we consider that the plaintiff was a heavy man, that he fell off backward, that the driver had his horse and the brake to attend to, and actually caught hold of the plaintiff and tried to rescue him, and that the space of time between the fall and the injury could not have exceeded five seconds, it is impossible to say that there were any facts on which the jury could find that the defendant, after the plaintiff's fall, omitted to do anything which a street railway company of ordinary care should have done in the like circumstances.

I think the judge committed no error in ordering a verdict for the defendant, and that the judgment should be affirmed with costs.

The other justices concurred.

CORPORATION—OFFICERS—SIGNATURE TO PROMISSORY NOTE.

CASTLE V. BELFAST FOUNDRY CO.

Supreme Court of Maine, March, 1881.

A vote of the directors of a corporation that the president have full power and control of its business, authorizes him to purchase the materials to be used in its operation, and to borrow money for the corporation, and give its note for the money borrowed.

A note signed "Belfast Foundry Company, W. W. Castle, President," binds the corporation; and if it

did not, the corporation, in this case, would be liable on the money counts for money loaned to it, and applied to the purchase of materials for its use or the payment of its debts. And it is immaterial whether the money is passed over to the corporation by the lender, or obtained by the president upon a deposit in a savings bank, transferred to him for that purpose.

On report.

The opinion states the case.

The law court to render such judgment as the law and evidence (legally admissible) require.

Philo Hersey and Wm. H. Fogler, for the plaintiff; *A. P. Gould and Joseph Williamson*, for the defendant.

APPLETON, C. J., delivered the opinion of the court:

This is an action of assumpsit on three promissory notes of the following form:

"\$330.36. Belfast, June 1, 1873.

One day after date we promise to pay to the order of Ellen H. Castle, three hundred and thirty dollars and thirty-six cents, at office Belfast Foundry Company, value received, with interest at ten per cent.

No. 13-1. Belfast Foundry Co.

Due June 2, 1873. W. W. Castle, Pres't."

In addition to the counts on the notes, are the usual money counts.

The evidence shows beyond any reasonable doubt that the plaintiff loaned the amounts for which the several notes were given to the defendant corporation, through the agency of its president, and that the money so loaned was appropriated in good faith to pay the laborers in its employ, and for materials used in its business. The defendant corporation resists the payment of the notes in suit on various grounds.

1. It is claimed that "Castle had no authority to borrow money or to make or sign a promissory note in behalf of the Belfast Foundry Company." Though a corporation may not be expressly empowered to make a note, or accept a draft, yet it may do so for any debt which it may lawfully contract. *Came v. Brigham*, 39 Me. 35. A corporation may issue negotiable paper for a debt contracted in the course of its business. *Kelley v. Brooklyn*, 4 Hill (N. Y.), 263. If it can contract a debt, it can give a note as evidence of its indebtedness. *Clarke v. School District*, 3 R. I. 199; *Moss v. Oakley*, 2 Hill (N. Y.), 265. W. W. Castle was president, treasurer and director of the defendant corporation, owning three-fourths of its stock. He had charge of its books, solicited and filled orders, purchased stock, and was the general manager of its concerns, and transacted all its business. As he could contract for the materials to be used, and the laborers to be employed, it would seem that he might give a note for any indebtedness arising in the general management of the business intrusted to his charge. But that is not all. On February 5, 1873, at a meeting of the directors, it was voted "that the president have the full power and control of all the busi-

ness of the company." The evidence is, that the president, after this vote, did all the business of the corporation for the following year. As he could purchase materials and employ men, under this vote he could give notes for debts arising under contracts made by him, to the persons to whom the corporation was indebted. So the authority to give such notes implies and includes the power to give notes for the money with which to pay such indebtedness, whether in the form of notes, or on the liability of the original contract.

In *Whitney v. South Paris Manufacturing Co.*, 39 Me. 317, the agent was authorized "to purchase stock and make sales for the corporation, to hire and discharge help, and manage the concerns of corporation, being subject at all times to the direction of the board of directors." The restriction in that case imposed on the agent does not exist in the one at bar. In delivering the opinion of the court, Shepley, C. J., said: "The usual course of transacting the financial affairs of the company appears to have been by the agent. He procuring loans of money from banks and individuals, on notes of the company made by him, on drafts drawn by him, and on notes and drafts payable to the company and indorsed by him. Notices on such paper, given to him, would bind the company, and he might waive the right to require notice and render the conditional liability absolute. This would come within the scope of his authority to create an absolute liability; it being but one of the forms of doing it. When notes became payable and new loans or an extension of the time for paying those existing became necessary, he must have the power to meet the exigency, or the credit of the company must be destroyed and his financial operations cease." In *Bates v. Keith Iron Co.*, 7 Mete. 224, the agent, as in the case last cited, was subject to the control of the directors. It was held that the notes of the agent without the assent of the directors were valid, and that their assent might be presumed. "Unquestionably," observes Wilde, J., "he was fully authorized to employ workmen to carry on the business of the concern, and to pay them with the funds of the corporation; or not being in funds, he had authority to give notes of the corporation. *Odlorne v. Maxey*, 13 Mass. 178; and 15 Mass. 39; *White v. Westport Cotton Manf. Co.*, 1 Pick. 220." It is clear, therefore, that the president had authority to give notes, which would be binding upon the corporation.

Further, it appears from the records of the corporation, that at a meeting of the directors on December 29, 1879, the directors, W. W. Castle and Charles P. Hazeltine, present, the president and treasurer, W. W. Castle, made his report upon the affairs of the company.

"Voted, that all acts of W. W. Castle, as president and treasurer of the company, from January 23, 1873, to the present time be and are hereby ratified and confirmed. F. S. WALLIS,

Clerk, *pro tem.*"

There were but three directors. The action of

two is binding on the corporation. It would seem to be so, though one may have deceased or resigned.

2. It is urged that "the notes declared upon do not on their face purport to be the promissory notes of the Belfast Foundry Company." The notes in suit were payable "at office of Belfast Foundry Company." They were intended to bind some person or corporation. They were not intended to bind the president personally; for if they had been so intended, he would not have signed the name of the corporation whose agent he was, and which he had ample authority to bind. In *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338, the signature was as in the case at bar. Thus, "Massachusetts Steam Heating Company, L. S. Fuller, treasurer." In his opinion, Hoar, J., says: "The name of the company is signed to the note. This signature could not be made by the corporation itself, and must have been written by some officer or agent. It was manifestly proper that some indication should be given by whom the signature was made, as evidence of its genuineness; and Fuller added his own, with the designation of his official character. And that the whole taken together shows it to be the signature of the Massachusetts Steam Heating Company, and not of Fuller." The principle decided in this case is to be found in *Abbott v. Shawmut Ins. Co.*, 3 Allen, 215, and in *Atkins v. Brown*, 59 Me. 90.

In the cases cited by the learned counsel for the defendant, the signer appends to his signature a description of himself as agent, president, trustee or treasurer of some corporation, as in *Slawson v. Loring*, 5 Allen, 340, the next case to that of *Draper v. Massachusetts Steam Heating Company*, before cited, as well as in the other cases relied upon.

3. It is insisted that "the defendants are not liable upon the money count, for the money borrowed by Castle without authority, even if it were made to appear that he appropriated it to their use." It has been clearly shown that Castle was authorized to borrow the sums in controversy, and that they were applied to meet the liabilities of the defendant. The note given for a debt or loan is undoubtedly presumptive evidence of payment of such debt or loan. It is only to be regarded as payment, when the security of the creditor is not impaired. But if negotiable paper is taken under a misapprehension of the rights of the parties, the presumption of payment may be rebutted. *Paine v. Dwinel*, 53 Maine, 53. If the notes in this case are not binding, it is obvious that they were taken under a most material misapprehension, for it can not be doubted that they were given and taken as valid notes upon which the defendant corporation is liable.

Here, then, was a loan, the note given for it not binding. The loan remains. The president, Castle, was authorized to make it. The funds borrowed were applied to the discharge of the corporate liabilities. The note given not

being valid, the plaintiff may proceed on the original cause of action. The case on this hypothesis stands as if no note had been given. Assuredly, the loan to the defendant, through the agency of an authorized agent, and their use of the same, would constitute a good ground of action.

4. It is objected that the two notes dated October, 1873, for \$2,000 and for \$400, were not given for borrowed money, but for the plaintiff's credit in the savings bank. It is immaterial whether the plaintiff loaned bills or loaned a draft on which the money was collected. It is equally unimportant, she furnishing the book of the savings bank, whether her deposit was drawn by her, or by her authorized agent, provided the Belfast Foundry had the funds so drawn out. It is abundantly proved that it had the benefit of them. The plaintiff should recover for them.

Defendant defaulted.

Walton, Barrows, Virgin Libbey and Symonds, JJ., concurred.

LEGAL TITLE TO REAL ESTATE — UNRECORDED DEED—ESTOPPEL.

TRENTON BANKING CO. v. DUNCAN.

New York Court of Appeals, October 4, 1881.

A party in whom is the legal title to real estate, and who has leased it to the banking institution from which he bought it, and which occupies it as a place of business, and who withholds his deeds and the leases from record until the day before the failure of the bank, thereby holding out the bank to the public as the owner of the real estate, does not, in consequence of that fact, in the absence of fraud or laches equivalent to fraud, become liable to a correspondent of the bank who dealt with it on the presumption that it owned said real estate.

D. D. Lord, for appellant; *Francis Lynde*, for respondent.

ANDREWS, J., delivered the opinion of the court:

It is not claimed that the plaintiff's judgment attached as a lien upon any interest, legal or equitable, of the judgment debtors in the premises sought to be charged in this action. They had no such interest, jointly or separately, either at the time of the recovery of the judgment or the accruing of the indebtedness upon which it was rendered. The title of record to the bank building and premises had been from June 28, 1853, in Alexander Duncan, Watts Sherman and William B. Duncan. The actual legal title was in Alexander Duncan under that conveyance and a deed of the undivided two-third parts of the premises, executed to him May 28, 1868, by Sarah M. G. Sherman, widow and sole devisee of Watts Sherman, and William B. Duncan and wife, subject to a mortgage on the premises for \$200,000,

dated May 5, 1858, and recorded June 28, 1858. The record title of the Pine street lot was in William B. Duncan, under a deed dated January 31, 1873, and recorded the same day. The deed was made subject to a mortgage of \$40,000, which the purchaser assumed as part of the consideration of \$85,000 paid for the premises. The actual title to this lot was also in Alexander Duncan, under a deed from William B. Duncan and wife, executed May 25, 1874, expressing the consideration of \$85,000, subject to the mortgage of \$40,000, which the grantor had assumed in the conveyance to him. The firm of Duncan, Sherman & Co. was originally constituted in 1852, and was then composed of Alexander Duncan, Watts Sherman and William B. Duncan. The firm purchased the bank lot and erected thereon the bank building known as Duncan, Sherman & Co.'s banking house, and occupied it for the purposes of its business as bankers. The membership of the firm was changed from time to time by the introduction of new partners and the death or withdrawal of others; but through all the successive changes the firm name of Duncan, Sherman & Co. was continued, and the successive firms continued to occupy for their business the same banking house. The original partnership expired by limitation July 1, 1862. Alexander Duncan then withdrew from the business. The fact was announced in a circular issued by the firm, accompanied by a printed statement signed by Alexander Duncan to the effect that he had withdrawn no part of the capital contributed by him to the firm, but had made it over to his two sons, William B. and David Duncan, absolutely, to promote their interest and that of the new firm. The new firm was composed of Watts Sherman, William B. Duncan and David Duncan. Upon the death of Watts Sherman in 1868, his son William Watts Sherman and Francis H. Greer were admitted as partners with William B. Duncan and David Duncan, and after the death of David Duncan in 1872, the firm consisted of William B. Duncan, William Watts Sherman and Francis H. Greer, and remained unchanged from that time until its failure, July 27, 1875. Subsequent to the conveyance of the banking house and premises to Alexander Duncan in 1868, the firm occupied the same as tenants, under a written lease executed by him, which, however, was a lease at will from year to year, containing no term, but providing for the payment of an annual rent of \$30,000, and containing a covenant by the lessees to pay taxes and repairs; and in like manner the firm occupied the Pine Street lot after the conveyance to Alexander Duncan in 1874, and sublet such parts of both premises as were not required for use in the firm business. The deeds to Alexander Duncan were not recorded until July 26, 1875, nor were the leases to the firm put on record. The dealings between the plaintiff and Duncan, Sherman & Co., commenced in 1874, upon the appointment by the plaintiff of Duncan, Sherman & Co. as its collect

ing agents in the City of New York, and the indebtedness upon which the plaintiff's judgment was recovered accrued in July, 1875, shortly before the failure of the firm. It is well settled in this State, that, in the absence of fraud, a judgment takes effect only on the actual interest in land which the judgment debtor has at the time of the recovery of the judgment, and, consequently, that the title of a grantee of the judgment debtor by deed executed before the entry of the judgment, although unrecorded, takes precedence of the judgment. The fact that the grantee has not recorded his deed creates no equity in favor of the judgment creditor. The latter is not a purchaser within the recording acts, and purchasers alone are protected by these acts against unrecorded conveyances. The general principle above adverted to is not assailed by the plaintiff, but its demand to have the real estate conveyed to Alexander Duncan subjected to the lien of its judgment against Duncan, Sherman & Co., is asserted upon the alleged ground that the defendant withheld his deeds from record, and knowingly permitted the firm to appear to be the owners of the property conveyed, whereby the plaintiff was deceived into giving the credit to the firm which resulted in the debt for which the judgment was rendered. In considering this claim, it is to be observed that the plaintiff does not here question the *bona fides* of the conveyances to Alexander Duncan, or deny that they were founded upon a valuable and adequate consideration. It is true that the complaint alleges that the consideration was inadequate, but the allegation is sustained neither by the proof nor the finding. The consideration for the conveyance of the Nassau-street property was \$500,000, and was paid by the purchaser assuming the mortgage for \$200,000, canceling a special loan of \$200,000 made by him to the firm in 1862, soon after he retired from the firm, and paying the balance of \$100,000. The consideration of the conveyance of the Pine-street lot, beyond the mortgage of \$40,000, was also paid at the time. The complaint also alleges that the defendant withheld the deeds from record for the purpose of avoiding a disclosure of the fact that the property was not part of the assets of Duncan, Sherman & Co., or of any individual member of the firm; but the court refused to find this fact as alleged, but found simply that the deeds were not recorded until the date before stated.

The complaint also alleges that after the deeds were executed, Duncan, Sherman & Co. held out to the public that the firm, or some of its members, were owners of the property, and that this was done with the knowledge of the defendant and with his concurrence; but this allegation is not supported by any finding. The court, however, found that when the plaintiff became a creditor of the firm, it was generally supposed that the bank building belonged to the firm, and that the plaintiff so believed, and continued its dealings under this belief until Duncan, Sherman

& Co.'s failure. It is undoubtedly true that a party who has a title to any property, real or personal, may, by his conduct in inducing others to deal with it, without informing them of his claim, debar himself from asserting that title to the injury of others. This principle was asserted by Chancellor Kent in the leading case in this State of *Wendell v. Van Rensselaer*, 1 Johnson, Ch. 344. "There is," says the chancellor, "no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." The case in which this language was used was one where the defendant claimed under a secret deed, intentionally concealed for many years, the grantor in the meantime remaining in possession; dealing with the land as owner, and with the knowledge of the defendant; making sales in fee of different parcels to third persons who entered into possession and made extensive improvements, the defendant standing by and giving no notice of his claims. "After this," says the chancellor, "he can not be permitted to start up with a secret deed and take land from *bona fide* purchasers from the testator." The case there was between the owner of the legal title under a secret deed and purchasers and grantees of the former owner. In this case the plaintiffs are creditors, but we see no reason why the same principle should not protect creditors, who have given credit upon the faith of the apparent ownership of property in possession of the debtor against a secret unrecorded conveyance, fraudulently concealed by the grantee; as when with knowledge that the debtor is holding himself out as owner, and is gaining credit upon this ground, he keeps silence, giving no sign.

Hungerford v. Earle, 2 Vern. 261, was the case of bond creditors to the father for money lent twelve years after a voluntary settlement on trustees for her sons, who did not enter and take possession according to the deed, but permitted the settlor to live in the house, etc.; and it was said that a deed not at first fraudulent may afterwards become so by being concealed and not produced, "by which means creditors are drawn in to lend their money." The case of *Storrs v. Barker*, 6 Johns. Ch. 166, presents another application of the principle of estoppel as against the owner of the legal title, and decides in accordance with previous decisions that if the true owner stands by and advises and encourages a purchase from another, although in ignorance of his own title, he can not afterwards assert it to the injury of the purchaser. It is not necessary now to consider what are the limitations, if any, to this

doctrine. But, as a general rule, it would seem to be just that if a person does an act at the suggestion and request of another, the other shall not be permitted to avoid the act, when it turns out to the prejudice of an antecedent right or interest of his own, although the advice on which the other party acted was given innocently and in ignorance of his claim. The authorities establish the doctrine that the owner of land may, by an act *in pais*, preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the Statute of Frauds, and it would greatly tend to the insecurity of titles, if they were allowed to be affected by parol evidence, of light or doubtful character. To authorize the finding of an estoppel *in pais* against the legal owner of land, there must be shown, we think, either actual fraud, or fault or negligence, equivalent to fraud, on his part in concealing his title, or that he was silent when the circumstances would impel an honest man to speak, or such actual intervention on his part, as in *Storrs v. Barker*, so as to render it just that as between him and the party acting upon his suggestion he should bear the loss. Moreover, the party setting up the estoppel must be free from the imputation of laches, in acting upon the belief of ownership by one who has no right. In this case we are of opinion that the plaintiff must fail, for two reasons: First, for its laches in not examining the records, and in making no inquiry to ascertain in whom the actual title was vested; and second, because there is no finding of fraud on the part of the defendant, and no proof from which the inference necessarily and indubitably follows that his failure to record the deeds was with a fraudulent intent, and no clear evidence of knowledge of circumstances which called upon him to put the deeds on record. The plaintiff, when the dealing with Duncan, Sherman & Co. commenced, did not examine the records, and made no inquiry of them or of the defendant, or of any other person as to the ownership of the property. Its officers assumed without inquiry, from the possession by the firm, that the title was in Duncan, Sherman & Co. If the records had been consulted, they would have disclosed the fact that only one of the parties had any record title to the land, and that his interest in the banking house was an undivided third, subject to a mortgage on the whole lot for two-fifths of its value, and that the Pine street lot was mortgaged for nearly half its value. The plaintiffs, in giving credit to Duncan, Sherman & Co., relied, doubtless, upon the general credit of the firm, to which the fact that they occupied an expensive building, generally supposed to belong to them, contributed. The records showed that it was largely incumbered, and even this fact they took no pains to ascertain. The plaintiffs, we think, can not call upon the court to apply the highly penal doctrine of

equitable estoppel in this case, when they omitted the most obvious and natural means of ascertaining the true state of the title. We have no right to assume that if the inquiries had been made, the true facts would not have been disclosed. In the next place, there is no finding of any fraudulent intent on the part of the defendant, nor that he omitted to record the deeds to avoid disclosure or to maintain the credit of the firm; nor is there any proof that he knew that the firm was in failing circumstances; nor is there any proof that in fact its resources were not ample up to a short time before its failure. There may be grounds for suspicion of the *bona fides* of the defendant in omitting to record the deeds. The recording of deeds of valuable property is usual and generally an important precaution against supervening conveyances by the grantor. But the law does not impose upon grantees the recording of titles as a duty. We are not prepared to say, and we have no right to say, in the absence of any finding of fraud or proof of circumstances necessarily tending to the conclusion of fraud, that the omission by the defendant to record his deeds prevents him from asserting as against the plaintiff his legal title to the land. Assuming, as is claimed, that Duncan, Sherman & Co. held themselves out as owners of the property, or were guilty of fraud (facts not found), the defendant can not be charged with the consequences in the absence of knowledge on his part. The case is not then within the principle stated by Lord Cottenham in *Nicholson v. Hoover* (4 My. & Cr., 186), that a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction.

The judgment should be affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

NATIONAL BANK—MORTGAGE OF REAL ESTATE TO SECURE FUTURE ADVANCES.—A mortgage on real estate to a national bank to secure future advances is not void under the National Banking Act as a security for the debt, but is an objection which can be urged by the government alone in any proceedings instituted by it against the bank for forfeiture. Reversed. In error to the Supreme Court of the State of New York. Opinion by Mr. Justice FIELD.—*National Bank of Genesee v. Whitney*.

MUNICIPAL CORPORATIONS — RAILWAY AID BONDS — CONDITIONS.—Morgan County subscribed \$50,000 to the capital stock of the Illinois River Railroad Co. The bonds were not issued

immediately, and application therefor was made by R. S. Thomas, the president of the railroad company. In order to meet some objections urged against their immediate issue, that officer (upon his own responsibility, so far as the evidence discloses) filed with the county clerk a certificate stating that the part of the railroad north of the town of Virginia was then in process of construction, and that the part between Jacksonville and Virginia was "under contract to be completed by the 1st of December, 1858, and that it is provided in the contract for the construction of said road that the Morgan County bonds are to be expended for work done in Morgan County, and not elsewhere." The county court, at its September term, 1857, thereupon entered of record an order, which, after reciting, among other things, the execution of that certificate, and that the interest and advantage of the county would be promoted by the delivery of the bonds theretofore subscribed, directed "that there be delivered to the Illinois River Railroad Company the amount of \$50,000 of the bonds of this county of this date," etc.; also, that the certificate of stock "be deposited with the treasurer of the county for safe keeping," etc. *Held*, in a proceeding in equity to subject these bonds to the payment of claims accruing for work done upon the road without Morgan County, that the capital stock and unpaid subscriptions thereto of a corporation constitute a trust fund for the benefit of its creditors, and can not be released by agreements between the stockholder and the corporation without the consent of creditors, except for a *bona fide* valuable consideration. *Affirmed*. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Justice HARRIS.—*Morgan County v. Allen*.

ILLEGAL CONTRACT—PUBLIC POLICY—DIRECTING A VERDICT—COURT'S DISCRETION.—This is an action to recover the sum of \$136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire-arms to the Turkish government, effected through his influence. The defendant pleads the general issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was Consul-General of the Ottoman government at the port of New York. The defendant is a corporation, created under the laws of Connecticut. The action was originally commenced in the Supreme Court of New York, and on motion of the defendant, was removed to the Circuit Court of the United States. When it was called for trial, and the jury was impaneled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case, and the facts which they proposed to prove. From such statement it appeared that the sales for which commissions were claimed by the plaintiff were made whilst he was an officer of the Turkish government, and through the influence which he exerted upon its

agent, sent to this country to examine and report in regard to the purchase of arms. The defendant, considering that the facts which the plaintiff proposed to prove showed that the contract was void as being corrupt in itself and prohibited by morality and public policy, upon which no recovery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, after which the court directed the jury to find a verdict for the defendant, which was accordingly done. Judgment being entered upon it, the case was brought to this court for review. It was *held* that the court did not err: 1. In directing a verdict for the defendant upon the opening statement of the plaintiff's counsel. *Merchants Bank v. State Bank*, 10 Wall. 637; *Pleasants v. Fant*, 22 Wall. 122; *Railroad Co. v. Fraloff*, 100 U. S. 26. 2. In holding that the question of the illegality of contract could be considered in the case, the same not having been specially pleaded. 3. In adjudging that the contract set forth in the opening statement was illegal and void. *Affirmed*. In error to the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Justice FIELD.—*Oscanyan v. Winchester Repeating Arms Co.*

SUPREME COURT OF ILLINOIS.

September, 1881.

PURCHASE BY CHATTEL-MORTGAGEE AT HIS OWN SALE.—1. A purchase by a mortgagee at his own sale under a chattel mortgage will not be set aside and a redemption allowed, when the sale and purchase was made with the consent and under an understanding with the mortgagor. 2. When the mortgagor and his wife gave the mortgagor an absolute conveyance of the mortgaged premises in full satisfaction of the indebtedness, and the mortgagee, to avoid certain judgment liens, made a sale under a power in his mortgage of the property to one who immediately conveyed back to the mortgagee, without paying anything on the purchase, and the mortgagee then surrendered the notes and the mortgagor's deed, and received possession of the premises, and held them without any claim or objection by the mortgagor for over three years, and it appearing that the property was worth but little more than the indebtedness, and no fraud or over-reaching being shown, it was *held*, that a bill to set aside the sale and allow a redemption was properly dismissed. *Affirmed*. Opinion by MULKEY, J.—*Goodell v. Devey*.

CORPORATION—STOCKHOLDER'S LIABILITY—ASSETS.—1. Under sec. 9 of the act of 1857, re-

lating to manufacturing corporations, the stockholders are made severally and individually liable to the creditors of the company to the amount of stock held by them for all debts, etc., made by such company prior to the time when the whole capital stock shall have been paid in. This liability can not be enforced by a single creditor suing in his own behalf alone. It can be enforced only upon a bill brought by, or at least in behalf of all the creditors of the corporation. 2. Stockholders in a corporation organized under a law making them liable individually for the debts of the corporation, will not be required to pay any portion of such debts, until the assets of the corporation are first exhausted. If such assets are in the hands of an assignee for the benefit of creditors, he will be a necessary party to a bill in chancery to enforce the stockholders' individual liability. 3. The court are inclined to think that the provisions of the act of 1857, relating to corporations, and making stockholders individually liable for the debts of the corporation, were superseded and became inoperative by reason of the general law of 1872 upon the same subject, but find it unnecessary to adjudge that question. Affirmed. Opinion by DICKEY, J.—*Harper v. Union Manf. Co.*

ELECTION — IRREGULARITIES IN CONDUCTING.—1. Mere irregularities in conducting an election and counting the votes, not proceeding from any wrongful intent, which deprives no legal voter of his vote, and does not change the result, will not vitiate the election, so as to justify the rejection of the entire poll of the town or precinct. 2. The failure to number the ballots cast at an election, and to count the votes as required by the statute, and to string the ballots on a thread or twine in the order of their reading, and the allowance of persons, not judges or clerks of the election, to assist in counting the votes, and the presence of persons in the room during the count, not challengers or officers, when nothing appears to show any injurious effects, or that the votes were not truly counted, will not justify the court on a contest of the election to exclude the entire poll and vote of a town as fraudulent and void. Reversed. Opinion by SHELDON, J.—*Hodge v. Linn.*

HOMESTEAD—PURCHASE MONEY—ABANDONMENT.—1. Where a party exchanged land on which there was an incumbrance, for another tract, agreeing to discharge the incumbrance, and taking a deed in which a lien was reserved to secure the performance of the agreement to remove the incumbrance on the other land, and afterwards borrowed money with which to relieve his vendor's land from the incumbrance, giving a mortgage on his land to secure its re-payment, it was held, that the money so borrowed was in no sense purchase money of the land mortgaged by him. 2. Where the owner of land which had been sold in foreclosure of a mortgage, which failed to release the homestead, induced another

to purchase the land by taking up the certificate of purchase, the time of redemption being nearly expired, and pay him the balance of the purchase money, \$400, and accepted a lease from such purchaser, but learning of the defect in respect to the release of the homestead, refused to surrender possession to the purchaser, and filed his bill to enjoin the recovery of possession by forcible detainer without paying back the \$400 paid him, it was held, that under the maxim, he that seeks equity must do equity, and come with clean hands, the complainant was not entitled to the relief sought. 3. Where the owner of land sold on foreclosure against him sells his interest to another, who procures an assignment of the certificate of purchase, and pays the balance of the price to such owner, who, after a deed is made on the foreclosure sale, takes a lease of the person so purchasing, the accepting such lease will be a surrender and abandonment of the premises, within the meaning of the homestead act, and the former owner will have lost his homestead, though not properly released in the mortgage under which the sale was made. Reversed. Opinion by CRAIG, J.—*Winslow v. Noble.*

TRUST—A STRANGER TO THE FUND CHARGEABLE AS TRUSTEE.—1. To charge a stranger to a trust fund as a trustee by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt paid by it was at the time in fact a private debt, or such a debt that payment thereof could not lawfully be made out of such fund. 2. If a depositor pays his own debt to a banker by a check upon funds to his credit in a fiduciary capacity, the banker will be affected with knowledge of the unlawful character of the appropriation, and will be compelled to refund to the *cestui que* trust, but the debt paid must be such as that the officers of the bank are aware that the same is really and in truth his own private debt. 3. Where a treasurer of a village borrowed money of a bank on his own note, secured by valuable collaterals, professing at the time to be borrowing the sum for the village to pay off its warrants in anticipation of the collection of its taxes, and such money was placed to his account in bank as treasurer, and most of it applied in payment of village warrants, and after the receipt of the taxes he gave the bank a check upon the trust fund in payment of his note, and the bank in good faith believing the debt to have been incurred for the village, accepted the payment and surrendered the note and collaterals: Held, that the payment could not be rescinded by the village, and the bank be held responsible for the money so paid. Reversed. Opinion by DICKEY, J.—*Fifth Nat. Bank v. Hyde Park.*

QUERIES AND ANSWERS.

*1.*The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]*

QUERIES.

49. A conveys real estate to "B, C and D, executive committee of (a specified secular corporation)," "granting, bargaining, selling, conveying and confirming unto said parties of the second part, their heirs, successors and assigns forever, said real estate. To have and hold said premises unto the said B, C and D, executive committee of (said corporation) their heirs, successors and assigns." Afterwards, "B," C and E, executive committee of (said corporation), convey said premises to S, in which deed "B, C and E, executive committee as aforesaid, for themselves and their successors, covenant * * * that they are lawfully seized in their own right as such committee of said real estate." Signed, B, chairman; C, treasurer; E, secretary. The officer taking the acknowledgment certifies that before him "came B, C and E, being the board of executive committee of (said corporation), and duly acknowledged the execution of this deed." * * * Now, granted that the records of said corporation show that at the date of the first deed, B, C and D, and at the date of the second deed, B, C and E were such executive committee; granted, also, that B, C, D and E were married men, and that the parties and premises and conveyances were in, and subject to the laws of Kansas,—where is the title to said real estate? Give authorities. J.
Topeka, Kan.

50. Can a conviction of receiving stolen property, knowing it to be stolen, be sustained on an indictment charging the principal with embezzlement under the statute, and the receiver acquiring the property with knowledge that it was so embezzled? The first article of the penal code of the State of Texas reads as follows: "The design of enacting this code is to define in plain language every offense against the laws of this State, and affix to each offense its proper punishment." Theft and embezzlement are defined, and embezzlement is made a separate and distinct offense from theft. Buying embezzled property, knowing it to be embezzled, is not made an offense. The code of criminal procedure makes embezzlement a degree of theft. The statute on the subject of receiving stolen property, etc., is as follows: "If any person shall receive or conceal property, which has been acquired by another, in such manner as that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, he shall be punished in the same manner as by law the person stealing the same would be liable to be punished." "Theft is the fraudulent taking of corporeal personal property belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person so taking." B. C.
San Antonio, Tex.

51. Can a city of the fourth class, under the statutes of Missouri (Rev. 1879), levy a tax for city purposes on the personal property of a resident of said city, the personal property being outside of the corporate

limits? For instance, cattle kept in another township in same county? D.
Hovilton, Mo. 232

QUERIES ANSWERED.

Query 22. [13 Cent. L. J. 159.] R, an attorney on being elected judge, made an arrangement with S to succeed him in his unfinished professional business, by which it was agreed that S would represent him in all his cases, and for his services should be entitled to and receive all the fees in them, regardless of the past services of R; and in pursuance of the agreement S represented R in one of the cases in which there had been no agreement with the client as to the amount of the fee he was to pay, and prosecuted it to final judgment. The questions are: 1. Whether the client was bound by the agreement between the attorneys, unless he was a party or privy to it, or afterwards assented to it? and 2. Whether S could maintain an action against the client for both his and R's services, unless under a special agreement between the attorney and client, or as assignee of R's claim for his services. W.
Fort Smith, Ark.

Answer. First. The employment of an attorney is a bilateral contract, the consideration being the personal professional services of that attorney, and is strictly personal and non-transferable. Second. Where open accounts are, by statute, transferable, they belong to assignable paper, and, if any part of the contract was entirely performed, the assignor and original attorney might sue and his assignee would have his right of action thus far, against the obligee in bilateral contract, provided by contract incorporated into the body of the warrant of attorney, the contract on employment was divisible, and could be performed at intervals, and its payment demanded at periods. See Pothier on Obligations, and Code Napoleon. Texas.
Meridian, Bosque Co., Texas.

NOTES.

—A correspondent sends us the following account of the spicy rebuke of a jury to a fault which is but too common with a certain class in the profession. It is of course unnecessary to say that the verdict meets with our hearty approval: The fall term of the Putnam circuit court, just closed here, will go down to history as an epoch in the progress of jurisprudence. As a prosecuting witness against C S, charged with being an accessory in an extensive robbery, appeared a respectable old lady named Smith. A B, the oldest practicing member at this bar, and a politician of some note, was employed as counsel for the defense, and in his speech for his client abused the old lady, repeatedly and vehemently calling her an old "liar." The jury returned a verdict of acquittal, but accompanying it they sent a second verdict against the attorney, as follows: "We, the regular impaneled jury, being men that love decency and courtesy toward our fellow-men, do say that A B did, without any cause whatever, call a lady, Mrs. Smith, a liar. We do say that we denounce all such conduct, and respectfully suggest that he be reprimanded by the court." This is perhaps the first case in the United States where an attorney was "found guilty" and his client cleared.